IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 651

MARYLAND CASUALTY COMPANY,
(A Corporation),
Petitioner,

vs.

OLIVE RAY TOUPS,
individually and as next friend of
HELENA ESTELLE TOUPS and JOHN HENRY TOUPS,
Minors, and
HELENA ESTELLE TOUPS and JOHN HENRY TOUPS,
Minors,
Respondents,

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Daily Record Co., Baltimore 3, Md.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

May it please the Court:

The petition of Maryland Casualty Company respectfully shows to this Honorable Court:

A.

THE QUESTION PRESENTED BY THIS PETITION

Is the remedy against the employer for the death of a seaman, whose contract of employment and work are mari-

time, and who is drowned in the course of his employment, within the exclusive admiralty or maritime jurisdiction?

In other words, did the Courts below err in applying the Workmen's Compensation Law of the State of Texas in this case, and in entering and sustaining a judgment based upon that State law?

B.

SUMMARY STATEMENT OF THE MATTER INVOLVED

The following statement of the essential facts is taken verbatim from the opinion of the Court of Appeals for the Fifth Circuit (R. 285). Record references have been interpolated into the quotation.

> "Clifton James Toups was both captain and crew of the 46-foot vessel, 'Relief No. 1', of the Sabine Pilots Association (R. 89). That association was engaged in supplying pilots to seagoing vessels that came into, and went out of, Port Arthur, Texas, through the waterways of Sabine Pass and Tributaries, and in furtherance of its business maintained, used, and operated certain docks and shore installations (R. 81, 82, 89). Toups was not one of the pilots of large seagoing ships but only of 'Relief No. 1' with which he took pilots out to meet the ships when they came in and brought them back when their pilotage had ended and their nautical charges had nosed out into the open sea (R. 83). In addition to navigating and keeping up the 'Relief No. 1', Toups sometimes served as engineer on one of the association's larger vessels (R. 90). But on the 17th day of October, 1946, while 'Relief No. 1' was undergoing some repairs, her skipper, under orders of his employer, was on a small dock of the association engaged in making fenders to hang over the side of his craft to cushion her against buffeting by the wharves and the big ships when she came alongside (R. 88, 106, 107).

"A witness some 150 feet away saw Toups moving up and down the dock, shortly thereafter heard a splash, and saw Toups in the channel floundering and struggling to grasp a ladder that reached from the water to the deck of the dock. The struggle was futile. The witness hastened to the scene but reached it barely in time to see Toups' finger tips as he sank beneath the water from which he was later taken as a corpse (R. 109-111)." (R. 285-6).

Maryland Casualty Company had issued to Sabine Pilots a policy providing Workmen's Compensation Insurance under the Statutes of Texas (R. 249). It also covered the liability of Sabine Pilots under the Longshoremen's and Harbor Workers' Compensation Act and under the Jones Act (R. 251, 263). An award of compensation was made to Mrs. Toups and her children by the Industrial Board of Texas under the Texas Workmen's Compensation Law (R. 4). Maryland Casualty Company filed suit in the District Court of the United States for the Eastern District of Texas to set aside that award (R. 4). Jurisdiction of the District Court was based on diversity of citizenship. The Defendants in said suit filed an answer and cross-complaint (R. 5) in which they prayed judgment against Maryland Casualty Company for 360 weeks compensation at $20 per week, in a lump sum, with costs.

Maryland Casualty Company defended the cross-complaint on a number of grounds, the only one relevant to this petition being that the District Court had no jurisdiction to render a judgment based upon the Workmen's Compensation Law of the State of Texas, because Toups' contract of employment and work (including the work that he was doing at the time of his death) were maritime in their nature, and that he died in the navigable waters of the United States; and therefore, any action for his death lies exclusively within the admiralty jurisdiction of the United

States. (See Motion for Instructed Verdict, R. 45; and Motion to Set Aside Judgment, etc., R. 67, which motions were overruled, R. 58, 275.) The Jury answered certain special issues (R. 52-57) following "statements by the trial Judge that were tantamount to directed verdict on those issues" (Opinion of Court of Appeals, R. 288) and Judgment was entered for Cross-Plaintiffs (R. 59).

From that judgment Maryland Casualty Company appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed the Judgment (R. 296) with an opinion by Circuit Judge Waller (R. 285 et seq.) who said (R. 292):

> "The deceased, under the holdings of the Supreme Court in Norton v. Warner, 321 U. S. 536, was, no doubt, a seaman on a vessel engaged in navigation and in aid of navigation, whose heirs, in the absence of an applicable State Workmen's Compensation Act, would be remitted to the Jones Act for redress. But since an action under the Jones Act must be grounded upon negligence, and since in the present case no negligence of the employer can be shown, the heirs of the deceased would be without remedy under that Act or in admiralty, and the Workmen's Compensation Act affords the exclusive remedy of the heirs against the employer of the deceased under the law of Texas. Such a result is not imperative unless the invocation of the State Compensation Act would 'interfere with the proper harmony or uniformity of that law (admiralty) in its international or interstate relations.' No inharmonious result is here possible."

We respectfully submit that the application of the State Compensation Act to a seaman, under the facts of this case, does interfere with the proper harmony and uniformity of the admiralty law, and is in conflict with recent opinions of this Honorable Court and of the United States Court of Appeals for the First Circuit.

C.

JURISDICTION

1. The statutory provisions believed to sustain the jurisdiction of this Court are Sections 1254 and 2101 (c) of Title 28, United States Code (Chapter 646—Public Law 773—approved June 25, 1948).

2. The date of the judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed is February 1, 1949 (R. 296). The opinion will be reported in ..... F. 2d. .... and appears on pages 285 to 295 of the Record.

3. The case involves the applicability under the facts set out above of the Texas Workmen's Compensation Law (Title 130 Revised Civil Statutes of the State of Texas), and particularly Article 8309, Section 1 thereof, which provides:

> " 'Employee' shall mean every person in the service of another under any contract of hire, expressed or implied, oral or written, except masters of or seamen on vessels engaged in interstate or foreign commerce, and except one whose employment is not in the usual course of a trade, business, profession or occupation of his employer * * *."

The exclusive admiralty or maritime jurisdiction is not limited to interstate and foreign commerce.

> Article 3 Section 2 of the Constitution;
> *London Guaranty and Accident Co. v. Industrial Accident Commission*, 279 U. S. 109 at 124.

Petitioner contends that the case is governed by the provisions of Article 3 Section 2 of the Constitution of the United States, which prevent the application of state laws in such a way as to interfere with the harmony and uniformity of the admiralty law. The application of state compensation laws to seamen does so interfere.

The Merchant Marine Act (June 5, 1920) 41 Stat 988, 1007 C 250, 46 U. S. C. A. Sec. 688 (the Jones Act)—adopted by Congress in the exercise of its paramount authority in reference to the maritime law—establishes a rule of general application in reference to the liability of employers for injuries to seamen extending territorially as far as Congress can make it go. That act operates uniformly within all of the states and is as comprehensive of those instances in which it excludes liability as of those in which liability is imposed; and, as it covers the entire field of liability for injuries to seamen, it is paramount and exclusive, and supersedes the operation of all state statutes dealing with that subject.

Lindgren v. U. S., 281 U. S. 38 at 46;
Northern Coal and Dock Co. v. Strand, 278 U. S. 142 at 147.

4. The question involved is substantial and important because although a "twilight zone" has been recognized between the Longshoremen's and Harbor Worker's Compensation Act and state compensation acts in connection with certain types of maritime workers, no such "twilight zone" exists in the case of seamen. This Court has consistently refused to apply state Workmen's Compensation Laws to seamen when injured in the course of their maritime employment.

5. Cases in this Court in conflict with the decision of the Court of Appeals herein:

London Guaranty & Accident Co. v. Industrial Accident Commission, 279 U. S. 109;
Norton v. Warner Company, 321 U. S. 565;
O'Donnell v. Great Lakes Dredge and Dock Co., 318 U. S. 36;
Warner v. Goltra, 293 U. S. 155;
Northern Coal and Dock Co. v. Strand, 278 U. S. 142.

6. Case in the United States Court of Appeals for the first Circuit in conflict with the Court of Appeals herein:

Gahagan Construction Corp. v. Armao, 165, F. 2d 301, cert. den. 333 U. S. 876.

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. Because the decision of the Court of Appeals in this case disturbs the uniformity of the maritime law dealing with seamen.

2. Because said decision of the Court of Appeals is in conflict with the following applicable decisions of this Court on an important question of admiralty jurisdiction:

London Guaranty & Accident Co. v. Industrial Accident Commission, 279 U. S. 109;
Norton v. Warner Company, 321 U. S. 565;
O'Donnell v. Great Lakes Dredge and Dock Co., 318 U. S. 36;
Warner v. Goltra, 293 U. S. 155;
Northern Coal and Dock Co. v. Strand, 278 U. S. 142;

3. Because said decision of the Court of Appeals in this case is in conflict with the following decision of another Circuit on the same point:

Gahagan Construction Corp. v. Armao, 165 F. 2d 301, cert. den. 333 U. S. 876.

4. Because the District Court erred in refusing an instructed verdict in favor of Petitioner and in entering judgment for Respondents herein, and the Court of Appeals erred in affirming said judgment.

5. Because although this Court has recognized a "twilight zone" between the Longshoremen's and Harbor Workers' Compensation Act and State Compensation Acts in connection with certain types of maritime workers, this Court has never recognized such a "twilight zone" in the case of seamen. This Court has been zealous to preserve to seamen the benefits of the Jones Act and other exclusive features of the general maritime jurisdiction, and has consistently refused to apply state laws to injuries to seamen but has insisted upon the application of the Jones Act and other characteristic features of the maritime law, even when the accident occurs on land.

Norton v. Warner Company, 321 U. S. 565;
O'Donnell v. Great Lakes Dredge and Dock Co., 318 U. S. 36;
Aguilar v. Standard Oil Company, 318 U. S. 724;
Swanson v. Marra Bros., 328 U. S. 1;
London Guaranty & Accident Co. v. Industrial Accident Commission, 279 U. S. 109;
Warner v. Goltra, 293 U. S. 155.

CONCLUSION

WHEREFORE your Petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 12,397, Maryland Casualty Company, Appellant, v. Olive Ray Toups, individually and as next friend of Helena Estelle Toups, et al., Minors, Appellees, and that said judgment of the United States Court of Appeals for the Fifth Circuit may be reversed by this

Honorable Court, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your Petitioner will ever pray.

MARYLAND CASUALTY COMPANY,

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Of Counsel.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

THE OPINIONS OF THE COURT BELOW

The District Judge filed no opinion in the case. His charge appears in the Record at page 229. The opinion in the United States Court of Appeals for the Fifth Circuit will be reported in ..... Federal Reporter, Second Series, ..., and appears in the Record at pages 285 to 295.

II.

JURISDICTION

A statement with respect to jurisdiction has been given in the Petition, and in the interest of brevity, is not repeated at this point.

III.

STATEMENT OF THE CASE

A statement of the case has been given in the Petition, and in the interest of brevity, is not repeated at this point.

IV.

SPECIFICATIONS OF ERRORS

1. The District Court erred in refusing an instructed verdict in favor of Petitioner (R. 45, 58), in entering judgment for Cross-Plaintiffs, Respondents herein (R. 59) and in refusing Petitioner's Motion to Set Aside Judgment, etc. (R. 67, 275).

2. The Court of Appeals for the Fifth Circuit erred in affirming said judgment (R. 296).

3. The Courts below erred in applying the Workmen's Compensation Law of the State of Texas in this case and in entering and sustaining a judgment based upon that state law.

V.

ARGUMENT

The question involved in this case is concisely discussed by the Court of Appeals for the First Circuit in the recent case of Gahagan Construction Corporation v. Armao, 165 F. 2d 301 at 303 (cert. den. 333 U. S. 876), as follows:

> "The concept of local concern developed after Southern Pacific Co. v. Jensen, 1917, 244 U. S. 205, 137 S. Ct.

524, 61 L. Ed. 1086, L. R. A. 1918, 451, Ann. Cas. 1917E, 900, and subsequent cases, which propounded the doctrine that state workmen's compensation acts could not constitutionally be applied, even by state courts, to injuries incurred by maritime workers on navigable waters. Just when a matter is of local concern only so that the state law may be applied is a question that has long perplexed the courts. The only verbal test given in the cases is that if the employment has no direct relation to navigation and commerce, if state regulation will not prejudice the uniformity of the maritime law, then state laws may be applied and the general maritime jurisdiction abrogated. Millers' Indemnity Underwriters v. Braud, 1926, 270 U. S. 59, 46 S. Ct. 194, 70 L. Ed. 470; Grant Smith-Porter Ship Co. v. Rohde, 1922, 257 U. S. 469, 42 S. Ct. 157, 66 L. Ed. 321, 25 A. L. R. 1008. No more definite test has been laid down, with resulting confusion in the lower federal courts. The constitutional basis of the Jensen case has been severely questioned, but the idea of an exclusive maritime law not subject to state law has never been repudiated by the Supreme Court. As late as 1941, the Court in Parker v. Motor Boat sales, 314 U. S. 244, 62 S. Ct. 221, 86 L. Ed. 184, stated that regardless of the constitutional basis of the Jensen and later decisions, Congress in the enactment of the Longshoremen's and Harbor Workers' Compensation Act had accepted them as defining the line between admiralty and state power.

"Some indication of what the Supreme Court considers to be of only local concern may be gathered from an examination of the decisions. Thus, a state workmen's compensation act may be applied to a carpenter injured while working on a ship which has been launched but not yet completed, Grant Smith-Porter Ship Co. v. Rohde, supra; to a diver employed by a shipbuilding company to remove obstructions in the course of a river, Millers' Indemnity Underwriters v. Braud, supra; to a longshoreman injured on land, Smith & Son v. Taylor, 1928, 276 U. S. 179, 48 S. Ct.

228, 72 L. Ed. 520; to a lumber inspector temporarily aboard a schooner checking a cargo of lumber being unloaded from another vessel, Rosengrant v. Havard, 1927, 273 U. S. 664, 47 S. Ct. 454, 71 L. Ed. 829; to a person trying to launch a small boat, Alaska Packers' Ass'n v. Industrial Accident Comm., 1928, 276 U. S. 467, 48 S. Ct. 346, 72 L. Ed. 656; to men engaged in logging operations, Sultan Ry. & Timber Co. v. Department of Labor, 1928, 277 U. S. 135, 48 S. Ct. 505, 72 L. Ed. 820; and to an engineer working on a barge dismantling a bridge, Davis v. Department of Labor, 1942, 317 U. S. 249, 63 S. Ct. 225, 87 L. Ed. 246. On the other hand the general maritime law is controlling and state laws can not constitutionally be applied to stevedores injured on navigable waters, Minnie v. Port Huron Terminal Co., 1935, 295 U. S. 647, 55 S. Ct. 884, 79 L. Ed. 1631; Employers' Liability Assurance Corporation v. Cook, 1930, 281 U. S. 233, 50 S. Ct. 308, 74 L. Ed. 823; Northern Coal & Dock Co. v. Strand, 1928, 278 U. S. 142, 49 S. Ct. 88, 73 L. Ed. 232; Southern Pacific Co. v. Jensen, supra; State of Washington v. Dawson & Co., 1924, 264 U. S. 219, 44 S. Ct. 302, 68 L. Ed. 646; nor to repairmen working on ships. Baizley Iron Works v. Span, 1930, 281 U. S. 222, 50 S. Ct. 306, 74 L. Ed. 819; Robins Dry Dock & Repair Co. v. Dahl, 1925, 266 U. S. 449, 45 S. Ct. 157, 69 L. Ed. 372; Gonsalves v. Morse Dry Dock Co., 1924, 266 U. S. 171, 45 S. Ct. 39, 69 L. Ed. 228.

"The Supreme Court has indicated that within a shadowy area where it is unclear which law should apply, if either the Longshoremen's Act or a state act is applied, the result will be upheld. See Davis v. Department of Labor, supra. But it should be noted that the overlap is between the federal compensation act and the state acts. It has not been suggested that the Jones Act and the State Acts overlap. In no case in the Supreme Court in which the injured person was a seaman performing a seaman's duties on navigable water, has state law been held applicable. Even those

members of the Supreme Court who customarily dissented in the application of the Jensen rule, concurred in holding state acts inapplicable where the injured person was a seaman covered by the Jones Act. See Employers' Liability Assurance Corporation v. Cook, supra, 281 U. S. at page 237, 50 S. Ct. 308, 74 L. Ed. 823; Northern Coal & Dock Co. v. Strand, supra, 278 U. S. at page 147, 49 S. Ct. 88, 73 L. Ed. 232. Summarily stated, their theory was that the Constitution itself did not prohibit state action in the silence of Congress, but after Congress had spoken there could be no state regulation."

Gahagan Construction Corporation v. Armao, 165 F. 2d 301 at 303.

The decedent in the case at bar was a seaman,

Opinion of Court of Appeals herein (R. 292);
Norton v. Warner, 321 U. S. 536;
Warner v. Goltra, 293 U. S. 155.

and was covered by the Jones Act (June 5, 1920) 41 Stat. 988, 1007 c. 250, 46 U. S. C. A. sec. 688, even though he fell from the dock into the water.

In the case of *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U. S. 36, 87 L. Ed. at 602, this Court, speaking through Chief Justice Stone, said:

"The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters. See Waring v. Clarke, 5 How. (U. S.) 441, 12 L. Ed. 226, and New Engle Mut. M. Ins. Co. v. Dunham, 11 Wall. (U. S.) 1, 20 L. Ed. 90, supra"

The Sabine Pass, in which the Relief No 1 customarily plied, is navigable water, and the navigable tidewater extended right up under the dock from which Toups fell.

The work of making the fenders for his boat, which Toups was engaged in when he fell off the dock and was drowned, was maritime work essential to the proper operation of his boat.

CONCLUSION

By the Merchant Marine Act—a measure of general application—Congress has occupied the field of injuries to and death of seamen arising out of their employment, and has provided certain remedies. No state statute can validly provide any other or different remedies. The case at bar is important because this Court has been zealous to preserve to seamen the benefit of the Jones Act and other exclusive features of the maritime law. The decision in this case disturbs the harmony and uniformity of that law and is in conflict with a decision of the First Circuit, as well as with the principles laid down by this Court. We respectfully submit that the petition should be granted and the judgment of the Court of Appeals for the Fifth Circuit reversed.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF

To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of the United States:

Preliminary Statement

The opinion of the Court of Appeals is now reported in 172 Fed. (2d) 542, and the facts are without dispute. The vessel "Relief No. 1" was a small vessel, having the tonnage

of only two or three gross tons, and was not even enrolled in the Custom House under the Federal Law, simply having been assigned a number by the Coast Guard (R. 103). The employer testified that at the time Toups met his death he was working on the inner jetty dock at Sabine Pass (R. 89) making fenders as he had been instructed to do (R. 96). The vessel, upon the date of the fatality, was undergoing repairs and Toups was upon this dock engaged in making fenders for use upon the vessel, at which time he fell from the dock and drowned (Opinion, Court of Appeals, R. 286).

After full disclosure of the employer to the petitioner in this cause of the circumstances surrounding the death of the deceased, and the nature of the duties of the deceased, petitioner accepted liability under the State Workmen's Compensation Law and began the payment of workmen's compensation thereunder (R. 16, et seq.).

The defense being interposed that the cause of action was exclusively maritime in nature and therefore controlled by the Jones Act (46 U.S. CODE, Sec. 688) the Court of Appeals, after citing SOUTHERN PACIFIC CO. v. JENSEN, 244 U.S. 205, quoted from MILLERS' INDEMNITY UNDERWRITERS v. BRAUD, 270 U.S. 59, and GRANT SMITH-PORTER CO. v. ROHDE, 257 U.S. 469, and concluded that the District Court of the United States was not without jurisdiction to apply the Texas Workmen's Compensation Act to the facts in the present case. The Court said:

> "But since an action under the Jones Act must be granted upon negligence, and since in the present case no negligence of the employer can be shown, the heirs of the deceased would be without remedy under that Act or in admiralty, and the Workmen's Compensation Act affords the exclusive remedy of the heirs against the employer of the deceased under the law of Texas.

Such a result is not imperative unless the invocation of the State Compensation Act would 'interfere with the proper harmony or uniformity of that law (admiralty) in its international or interstate relations.' No inharmonious result is here possible. The deceased, at the time of his death, was working upon the dock making fenders for the use of his small boat. He hauled no interstate or foreign commerce. Neither his vessel nor his work affected the intricate relations that involve the ship, crew, master, owner, cargo, shipper, consignee, or responsibility, or lack of it, under the law of the sea. Neither the activity of the deceased nor the method of compensation agreed upon for his family could have interfered with the proper harmony or the uniformity of the law that prevails, and should prevail, in all substantial relations arising out of maritime commerce, whether interstate or international."

COUNTER POINTS

First Counter Point

The decision of the Court of Appeals in the instant case in holding that the application of the Texas Workmen's Compensation Law to the facts at bar would not interfere with the proper harmony or uniformity of the admiralty law in its international or interstate relations is correct.

Second Counter Point

The employment of the deceased being partly maritime and partly non-maritime in nature, and the injury having occurred upon an extension of the land at a time when the employee was not engaged directly in the service of his vessel, the Court of Appeals correctly held that the applicability of the Texas

Workmen's Compensation Law would not interfere with the uniform application of the law of admiralty.

Argument and Discussion of Authorities

Our points are so intimately related that to argue one is to argue the other; separate argument would involve repetition.

We have heretofore pointed out the facts surrounding the death of the deceased, Toups, and it is certain that he met his death by falling from the dock which was but an extension of the land. We believe that the rule as enunciated by this Honorable Court in STATE INDUSTRIAL COMMISSION v. NORDENHOLT CORPORATION, 259 U.S. 263, at 272, is correct:

> "When an employee working on board a vessel in navigable waters, sustains personal injuries there, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he had been injured on land while unloading the vessel. In the former situation the liability of employer must be determined under the maritime law; in the latter, no general maritime rule prescribes the liability, and the local law has always been applied. The liability of the employer for damages on account of injuries received on shipboard by an employee under a maritime contract is matter within the admiralty jurisdiction; but not so when the accident occurs on land."

The stage or wharf upon which the deceased was working was in law but an extension of the land. (CLEVELAND TERMINAL R. R. CO. v. STEAMSHIP COMPANY, 208 U.S. 316, at 321.

In O'BRIEN v. CALMAR STEAMSHIP CORP. (104 Fed. (2d) 148, certiorari denied, 308 U.S. 555) the plaintiff was a

seaman and was injured while upon a pier adjusting a gangplank to connect the vessel to the pier. Suit was brought under the Jones Act, but the trial court dismissed the action. Upon appeal the Third Circuit affirmed the decision of the District Court, saying:

> "The Act (Jones Act) has been construed not to extend beyond admiralty jurisdiction, and not to apply to injuries on land. * * * The trial court was without jurisdiction to entertain the suit. The Workmen's Compensation Law of Pennsylvania * * * presumably applied * * * ."

True it is that since the decision in the O'BRIEN CASE this Court has, in O'DONNELL v. GREAT LAKES DREDGE & DOCK CORP., 318 U.S. 36, held that seamen injured while ashore can recover under the Jones Act. The O'DONNELL CASE was one in which a deck hand was assisting in repairing a gasket connection used in unloading sand from his vessel. Suit being brought under the Jones Act, the award was denied by the Court of Appeals upon the ground that the injury occurred upon land, and the Jones Act was inapplicable. This Court took occasion to discuss the admiralty jurisdiction and power of Congress to extend to seamen the right to recover for personal injuries sustained while in the course of their employment for their vessel. The decision turned upon the theory that the Jones Act simply extended to seamen in the service of their vessel the right to recover compensatory damages in addition to their former remedy of maintenance and cure. The natural corollary of this rule was, of course, enunciated by the Court at the same term in the case of AGUILAR v. STANDARD OIL COMPANY OF NEW JERSEY, 318 U.S. 724. There the suit was brought for maintenance and cure because of injuries received while the seaman was ashore upon matters of personal business. The Court, after reviewing the authorities

relating to maintenance and cure, came to the conclusion that such was properly awarded to the claimants under the maritime law. Taking the AGUILAR and O'DONNELL CASES together, we find that admiralty can assume jurisdiction over injuries received by a seaman while ashore, either for his own personal convenience (maintenance and cure) or for compensatory damages under the Jones Act while in the service of his vessel. Of course, there can be no complaint with either of these decisions, since they are obviously grounded upon Congressional statutes and the admiralty law as determined by the United States Courts under the Constitutional provisions.

But we have here an entirely different situation. Our point is simply whether or not the employment of Toups under the circumstances, and the award of compensation to his widow and to his children for a death received in the course of his employment while at shore, would so interrupt the general scheme of harmony in the maritime law as to cause the Jones Act to be the exclusive remedy for his widow and children. We believe that JUDGE WALLER correctly ruled this case when he said that the activity of the deceased and the method of compensation agreed upon by Toups' family could not interfere with the proper harmony and uniformity of the maritime law. Consequently, the District Court had jurisdiction to apply the Texas Workmen's Compensation Law.

DISCUSSION OF PETITIONER'S CASES

Petitioner relies upon several decisions of this Court, and says that the decisions of the lower court is erroneous because of conflicts therewith. It is not believed that any of the cases cited by petitioner are decisive or control the case at bar.

The first case is that of LONDON GUARANTY & ACCIDENT

Co. v. INDUSTRIAL ACCIDENT COMMISSION, 279 U.S. 109. There the mother and stepfather of the deceased were denied compensation under the California Workmen's Compensation Law, when the facts disclosed that the employee was an apprentice navigator and seaman aboard a pleasure fishing vessel of some seven tons registry. The vessel had broken from its moorings and was about three quarters of a mile from the pier. A storm having arisen, the deceased employee, with several other men, put off in a small boat about eighteen feet long for the purpose of boarding their vessel, and returning her to the anchorage. As they neared the drifting vessel their boat was capsized by a heavy wave and all three drowned. The contention was made that the matter was one of local concern and did not affect commerce and navigation, and consequently the Industrial Accident Commission of the State of California had jurisdiction. CHIEF JUSTICE TAFT discussed the JENSEN CASE, supra, as well as those following, and discussed the so-called "local rule," and came to the conclusion that the deceased was a sailor, that his employment relation to the owner of the vessel was maritime in nature, and that the vessel was engaged in navigation as a registered vessel under the laws of the United States, engaged in the business of transporting people for hire. Comment was made upon the fact that the vessel was capable of navigation for 500 miles. The crux of the decision is found in this language:

> "To hold that a seaman engaged and injured in an employment purely of admiralty cognizance could be required to change the nature or conditions of his recovery under a State Compensation Law would certainly be prejudicial to the characteristic features of the general maritime law."

Certainly we have no such situation prevailing here, because the activities of Toups were, at the time of the receipt

of the injuries, and at least 30% of the time generally, non-maritime in nature, and upon land or extensions of the land. Additionally, we have the finding of JUDGE WALLER that the work was of such local nature as not to interfere with or prejudice the characteristic "features of the general maritime law."

There can be no argument but what the act of Congress, relating to admiralty within the scope of the Federal Constitution is paramount and exclusive, and supersedes the operation of all state statutes dealing with that subject. Thus the decision of LINDGREN v. UNITED STATES, 281 U.S. 38, is but the expression of a self-evident proposition, and one standing undisputed in the jurisprudence of the United States.

The next decision cited is that of NORTHERN COAL AND DOCK CO. v. STRAND, 278 U.S. 142, wherein the deceased went aboard the vessel for the purpose of assisting in discharging the cargo, and was struck by a clamshell and instantly killed. An award being granted under the State Workmen's Compensation Law, this Honorable Court reversed the ruling of the state court, saying:

> "Strand's employment contemplated that he should labor both upon the land and the water. When killed, he was doing longshore or stevedore work on a vessel lying in navigable waters, according to his undertaking. His employment, so far as it pertained to such work, was maritime; the tort was maritime; and the rights of the parties must be ascertained upon a consideration of the maritime law. * * * We have also held that state statutes providing compensation for employees through commissions might be treated as amending or modifying the maritime law in cases where they concern purely local matters and occasion no interference with the uniformity of such law in its international and interstate relations. * * * The unloading of a ship is not matter of purely local concern. It has direct relation to commerce and navigation, and uniform rules in respect thereto are essential. * * *."

Thus, contrary to the finding in the STRAND CASE, we have an affirmative finding by the Court of Appeals in this cause that the activity of Toups and the method of compensation could not interfere with the proper harmony or uniformity of the admiralty law. We contend that the STRAND CASE, therefore, is authority for the position taken by the Court of Appeals in the case at bar.

The next case is that of NORTON v. WARNER CO., 321 U.S. 565, and we find there that the question presented was whether or not a bargeman who lived, ate and slept aboard the barge was covered under the Longshoremen and Harborworker's Act, as against the defense of the exclusive admiralty jurisdiction. This court very properly held that it would distort the definition of the word "crew" as used in the Jones Act, to exclude the employee from the coverage of the Jones Act. The NORTON CASE, consequently, cannot be authority for support of petitioner's contention in this case. Our case does not turn upon whether or not the Longshoreman and Harborworker's Act is applicable, but whether or not the application of the State Workmen's Compensation Act to the case at bar would do harm to the uniformity of the maritime law. The NORTON CASE is of no value in that connection.

The decision of WARNER v. GOLTRA, 293 U.S. 155, simply presented the question of whether or not the master of a tug boat, killed through the negligence of the pilot, was covered under the Jones Act. The case turns simply upon the proposition that a "master" was a "seaman" within the meaning of the Jones Act, and such case is authority for no other rule of law. Certainly it can have no application to the facts in the case at bar.

Apparently great reliance is placed upon the decision of the First Circuit in the case of GAHAGAN CONSTRUCTION CORP. v. ARMAO, 165 F. (2d) 301, cert. den. 333 U.S. 876, because a lengthy quotation is quoted from this decision in connection with the brief of the petitioner in this cause.

There the employer was engaged in dredging operations through the use of a hydraulic dredge, building embankments for an airport. The dredge had no motive power and had to be towed by tugs or other vessels when coming from or going to the place of operations, the only machinery aboard being the turbine engines used in operating the mechanism of the dredge. Plaintiff was injured while checking the navigation lights aboard the dredge and brought suit under the Jones Act. He was met with the defense that he was not a member of the crew, and that the accident was not within the maritime jurisdiction of the United States, but that the plaintiff's exclusive remedy was under the Massachusetts Workmen's Compensation Law, or under the Longshoreman and Harborworker's Act of the United States.

In the ARMAO CASE the plaintiff was a deckhand and a member of the crew of the dredge and received his injury while he was adjusting the navigation lights of the dredge, while upon the dredge in navigable waters. Consequently, it is not difficult to see why the court there said that the Jones Act was properly applied to the exclusion of both the State and the Longshoremen's Act. The crux of the ARMAO DECISION is found in this language (165 Fed. (2d) 304):

> "In no case in the Supreme Court in which the injured person was a seaman performing a seaman's duty on navigable water has state law been held applicable."

Here the distinction is clear and plain because Toups was not a seaman performing seaman's duties on navigable water at the time of the receipt of his alleged injuries. On the contrary he was performing work that could have been done by any landlubber upon an extension of the land within the purview of the State Act and the Court of Appeals properly held such to be applicable. In reviewing the decisions of men working as was Toups, counsel for the respondents in this case is reminded of the carnival trick wherein the carnival

barker uses his three shells and one pea. The gullible are enticed into betting with the barker as to which shell conceals the pea and invariably the hand is quicker than the eye.

It seems that the widows and the orphans of men working around the waterfront are subjected to substantially the same legal prestidigitation as practiced by the carnival barker. If a recovery is sought under the Jones Act, the defendant promptly says that the Jones Act is not the appropriate remedy but the pea is under the shell labeled "Longshoremen and Harbor Workers' Act" or under that labeled "State Act". On the other hand, if the widows and orphans seek to pursue their remedy under the State Act, they are confronted with a similar move upon the part of the defendant, whereby the pea is under one of the other shells. It would seem that where the parties contract each with the other, as was done in this case, and definitely locate the pea under one particular shell (the State Act), and where such result does not interfere with the necessary uniformity of the Admiralty Law, this court should not permit this game to go along further. This court should say to Maryland Casualty Company and to Mrs. Toups and her two minor children:

> "You and the barker have gotten together and have located the pea under the State Act. The widow and orphans may now collect the bet."

Counsel for the respondents has not attempted to be facetious in this matter, but sincerely believes that a careful review of the decisions applicable to the so-called border line of maritime employment warrants the foregoing inference and analogy.

Believing that the District Court properly applied the law to the facts under the circumstances of this cause and that the Court of Appeals properly disposed of all of the contentions involved in this cause, the respondents respectfully say that the employment of Clifton James Toups was not

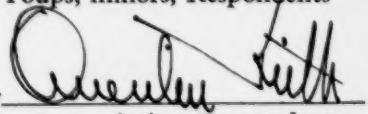
such that the application of the State Law would do any damage to the necessary uniformity of the maritime law in its general application.

Conclusion

WHEREFORE, for the reasons stated, the respondents respectfully pray that this court affirm the judgments of the courts below and that this court now finally order Maryland Casualty Company to pay to Olive Ray Toups and to Helena Estelle Toups and to John Henry Toups, the surviving widow and minor children of Clifton James Toups, those sums of money which Maryland Casualty Company covenanted and agreed that it would pay in its letter of December 16, 1946. The parties have contracted each with the other with reference to the State Law and now after more than two and one-half years following the death of Clifton James Toups, we submit that Mrs. Toups and her children should be awarded the compensation to which the parties agreed she was entitled.

Respectfully submitted,

OLIVE RAY TOUPS, individually and as next friend of Helena Estelle Toups and John Henry Toups, minors, and Helena Estelle Toups and John Henry Toups, minors, Respondents

By 

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